

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	File No. EB-09-SE-196
)	
Smith Bagley, Inc.)	Acct. No. 201132100032
)	
)	FRN No. 0002154706

ORDER

Adopted: July 6, 2011

Released: July 7, 2011

By the Chief, Enforcement Bureau:

1. In this Order, we adopt the attached Consent Decree entered into between the Enforcement Bureau (“Bureau”) of the Federal Communications Commission and Smith Bagley, Inc. (“SBI”). The Consent Decree terminates an investigation initiated by the Bureau regarding SBI’s compliance with section 4.9(e) of the Commission’s rules (“Rules”)¹ pertaining to the reporting of certain network outages.

2. The Bureau and Smith Bagley have negotiated the terms of the Consent Decree that would resolve this matter. A copy of the Consent Decree is attached hereto and incorporated herein by reference.

3. After reviewing the terms of the Consent Decree and evaluating the facts before us, we find that the public interest would be served by adopting the Consent Decree and terminating the investigation.

4. In the absence of material new evidence relating to this matter, we conclude that our investigation raises no substantial or material questions of fact as to whether Smith Bagley possesses the basic qualifications, including those related to character, to hold or obtain any Commission license or authorization.

5. Accordingly, **IT IS ORDERED** that, pursuant to section 4(i) of the Act,² and sections 0.111 and 0.311 of the Rules,³ the Consent Decree attached to this Order **IS ADOPTED**.

6. **IT IS FURTHER ORDERED** that the above-captioned investigation **IS TERMINATED**.

¹ 47 C.F.R. § 4.9(e).

² 47 U.S.C. § 154(i).

³ 47 C.F.R. §§ 0.111, 0.311.

7. **IT IS FURTHER ORDERED** that a copy of this Order and Consent Decree shall be sent by first class mail and certified mail, return receipt requested, to counsel for Smith Bagley, Inc., Todd Slamowitz, Esq., Lukas, Nace, Gutierrez & Sachs, LLP, 1650 Tysons Blvd., Suite 1500, McLean, VA 22102, and to Justin E. Hinkle, Chief Operating Officer, Smith Bagley, Inc., 500 South White Mountain Road, Suite 103, Show Low, AZ 85901.

FEDERAL COMMUNICATIONS COMMISSION

P. Michele Ellison
Chief, Enforcement Bureau

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CONSENT DECREE

The Enforcement Bureau of the Federal Communications Commission and Smith Bagley, Inc., by their authorized representatives, hereby enter into this Consent Decree for the purpose of terminating the Bureau's investigation into whether Smith Bagley, Inc. violated section 4.9(e) of the Commission's Rules.¹

I. DEFINITIONS

1. For the purposes of this Consent Decree, the following definitions shall apply:
 - (a) "Act" means the Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.*
 - (b) "Adopting Order" means an order of the Bureau adopting the terms of this Consent Decree without change, addition, deletion, or modification.
 - (c) "Bureau" means the Enforcement Bureau of the Federal Communications Commission.
 - (d) "Commission" and "FCC" mean the Federal Communications Commission and all of its bureaus and offices.
 - (e) "Compliance Plan" means the compliance obligations and compliance program described in this Consent Decree at Paragraph 8.
 - (f) "Effective Date" means the date on which the Bureau releases the Adopting Order.
 - (g) "Investigation" means the investigation commenced by the Bureau's February 17, 2010 Letter of Inquiry² regarding whether SBI violated section 4.9(e) of the Rules.

¹ 47 C.F.R. § 4.9(e).

² See Letter from Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission, to Richard Watkins, Chief Operating Officer, Smith Bagley, Inc. (February 17, 2010).

- (h) “Parties” means SBI and the Bureau, each of which is a “Party.”
- (i) “Rules” means the Commission’s regulations found in Title 47 of the Code of Federal Regulations.
- (j) “SBI” means Smith Bagley, Inc., and its subsidiaries as well as its predecessors-in-interest and its successors-in-interest.

II. BACKGROUND

2. Under section 4.9(e) of the Rules, a wireless communications provider, such as SBI, is required to submit to the Commission an electronic Notification within 120 minutes after discovering that it has experienced, on any facilities that it owns, operates, leases or otherwise utilizes, a network outage of a Mobile Switching Center of at least 30 minutes duration that: (1) potentially affects at least 900,000 user minutes of either telephony or paging service; (2) affects at least 1,350 DS3 minutes; (3) potentially affects any special offices and facilities, as defined in sections 4.5(a) through 4.5(d) of the Rules,³ other than airports through direct service facility agreements; or (4) potentially affects a 911 special facility, as defined in section 4.5(e) of the Rules.⁴ The provider also is required to submit electronically an Initial Communications Outage Report within 72 hours after discovering such an outage and a Final Communications Outage Report within 30 days after discovering such an outage.

3. On February 17, 2010, the Bureau issued a Letter of Inquiry (“LOI”) to SBI.⁵ The LOI directed SBI to submit a sworn written response to a series of questions relating to SBI’s compliance with the Commission’s network outage reporting rules. SBI responded to the LOI on March 19, 2010.⁶ The Bureau and SBI executed a Tolling Agreement on June 2, 2010,⁷ and Tolling Agreement Extensions on October 4, 2010,⁸ and December 22, 2010.⁹ These agreements, among other things, permitted the Parties to continue discussion of the law and facts relating to the matter under review in this Investigation.

III. TERMS OF AGREEMENT

4. **Adopting Order.** The Parties agree that the provisions of this Consent Decree shall be subject to final approval by the Bureau by incorporation of such provisions by reference in the Adopting Order without change, addition, modification, or deletion.

³ 47 C.F.R. § 4.5(a) – 4.5(d).

⁴ 47 C.F.R. § 4.5(e).

⁵ See *supra* note 2.

⁶ See Letter from David A. LaFuria, Esq. and Todd Slamowitz, Esq., Counsel for Smith Bagley, Inc., Lukas, Nace, Gutierrez & Sachs, LLP, to Nissa Laughner, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission (March 19, 2010).

⁷ See Tolling Agreement, File No. EB-09-SE-196, executed by and between Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission, and C. Barry Thomas, Chief Operating Officer, Smith Bagley, Inc. (June 2, 2010).

⁸ See Tolling Agreement Extension, File No. EB-09-SE-196, executed by and between Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission, and C. Barry Thomas, Chief Operating Officer, Smith Bagley, Inc. (October 4, 2010).

⁹ See Tolling Agreement Extension, File No. EB-09-SE-196, executed by and between Ricardo M. Durham, Acting Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission, and C. Barry Thomas, Chief Operating Officer, Smith Bagley, Inc. (December 22, 2010).

5. **Jurisdiction.** SBI agrees that the Bureau has jurisdiction over it and the matters contained in this Consent Decree and has the authority to enter into and adopt this Consent Decree.

6. **Effective Date; Violations.** The Parties agree that this Consent Decree shall become effective on the Effective Date as defined herein. Upon release, the Adopting Order and this Consent Decree shall have the same force and effect as any other order of the Commission. Any violation of the Adopting Order or of the terms of this Consent Decree shall constitute a separate violation of a Commission order, entitling the Commission to exercise any rights and remedies attendant to the enforcement of a Commission order.

7. **Termination of Investigation.** In express reliance on the covenants and representations in this Consent Decree and to avoid further expenditure of public resources, the Bureau agrees to terminate its Investigation. In consideration for the termination of said Investigation, SBI agrees to the terms, conditions, and procedures contained herein. The Bureau further agrees that in the absence of new material evidence, the Bureau will not use the facts developed in the Investigation through the Effective Date, or the existence of this Consent Decree, to institute, on its own motion, any new proceeding, formal or informal, or take any action on its own motion against SBI concerning the matters that were the subject of the Investigation. The Bureau also agrees that it will not, in the absence of new material evidence, use the facts developed in the Investigation through the Effective Date, or the existence of this Consent Decree, to institute on its own motion any proceeding, formal or informal, or take any action on its own motion against SBI with respect to SBI's basic qualifications, including its character qualifications, to be a Commission licensee.

8. **Compliance Plan.** For purposes of settling the matters set forth herein, SBI agrees to implement, within thirty (30) days of the Effective Date, a Compliance Plan designed to facilitate SBI's future compliance with the Act, the Rules, and the Commission's orders relating to the Commission's network outage reporting requirements. The Compliance Plan will include, at a minimum, the following components:

- (a) **Compliance Officer.** SBI shall designate a senior corporate manager to serve as the Compliance Officer for FCC network outage reporting, who will be responsible for implementing and administering SBI's Compliance Plan.
- (b) **Compliance Training Program.** SBI shall establish and maintain an FCC network outage reporting training program ("Compliance Training Program"), as detailed below, for all employees of SBI whose responsibilities include gathering and/or analyzing technical information regarding SBI's network outages for purposes of compiling and/or submitting SBI's outage reports to the Commission's Network Outage Reporting System ("NORS"); entering that information into any SBI database(s) and/or record(s) that is used by SBI to prepare and file its NORS reports; or preparing or submitting SBI's NORS reports (each employee of SBI who performs any of the foregoing duties shall be referred to herein as a "Covered Employee").
 - i. SBI's Compliance Training Program shall address, at a minimum, the following subjects in order to facilitate compliance with the FCC's network outage reporting Rules: (A) the Rules governing the reporting of network outages; (B) the information and calculations required by the Rules to determine whether a network outage is reportable under the Rules; (C) the time periods within which NORS reports must be submitted to the FCC; and (D) the standard internal operating procedures adopted by SBI to identify and report those network outages in accordance with the FCC's reporting criteria ("Operating Procedures"). Covered Employees also shall be advised of the regulatory

consequences in the event that SBI fails to comply with the FCC's outage reporting requirements.

- ii. Employees of SBI who are Covered Employees as of the Effective Date shall complete the Compliance Training Program within sixty (60) days of the Effective Date. New or re-assigned employees of SBI who become Covered Employees at any time after the Effective Date shall complete the Compliance Training Program within thirty (30) days of the date of their employment or re-assignment.
 - iii. SBI shall repeat such training annually, and shall take such steps as are reasonable, necessary and appropriate to update and enhance the Compliance Training Program to ensure that it is accurate and complete.
- (c) **Outage Reporting.** Beginning sixty (60) days after the Effective Date and thereafter, SBI shall include in any NORS report filed with the Commission the date and time that SBI discovered the outage was reportable using the following two separate fields: (1) Date Outage Determined Reportable and (2) Local Time Outage Determined Reportable (24 hr clock (nnnn)).
- (d) **Reporting Non-Compliance.** SBI shall report any non-compliance with section 4.9(e) of the Rules to the Bureau within fifteen (15) calendar days after the discovery of such non-compliance. Such reports shall include a detailed explanation of (i) each instance of non-compliance; (ii) the steps that SBI has taken or will take to remedy such non-compliance, including the schedule on which proposed remedial actions will be taken; and (iii) the steps that SBI has taken or will take to prevent the recurrence of any such non-compliance, including the schedule on which such preventive action will be taken. All such reports of non-compliance shall be submitted to Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554, with a copy submitted electronically to JoAnn Lucanik at JoAnn.Lucanik@fcc.gov, and Nissa Laughner at Nissa.Laughner@fcc.gov.
- (e) **Compliance Reports.** SBI shall file compliance reports with the Bureau ninety (90) days after the Effective Date, twelve (12) months after the Effective Date and twenty-four (24) months after the Effective Date.
- i. Each Compliance Report shall include a certification by the Compliance Officer, as an agent of and on behalf of SBI, stating that the Compliance Officer has personal knowledge that SBI (A) has established and implemented the Compliance Plan; (B) has utilized the Operating Procedures since the implementation of the Compliance Plan; and (C) is not aware of any instances of non-compliance with the terms and conditions of this Consent Decree.
 - ii. The certification shall be accompanied by a statement explaining the basis for the Compliance Officer's certification and must comply with section 1.16 of the Rules and be subscribed to as true under penalty of perjury in substantially the form set forth therein.
 - iii. If the Compliance Officer cannot provide the requisite certification, the Compliance Officer, as an agent of and on behalf of SBI, shall provide the Commission with a detailed explanation of (A) each instance of non-compliance; (B) the steps that SBI has taken or will take to remedy such non-compliance,

including the schedule on which proposed remedial actions will be taken; and (C) the steps that SBI has taken or will take to prevent the recurrence of any such non-compliance, including the schedule on which such preventive action will be taken.

- iv. All Compliance Reports shall be submitted to Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554, with a copy submitted electronically to JoAnn Lucanik at JoAnn.Lucanik@fcc.gov, and Nissa Laughner at Nissa.Laughner@fcc.gov.

- (f) **Termination Date.** Unless stated otherwise, the terms of the Compliance Plan will expire twenty-four (24) months after the Effective Date.

9. **Section 208 Complaints; Subsequent Investigations.** Nothing in this Consent Decree shall prevent the Commission or its delegated authority from adjudicating complaints filed pursuant to section 208 of the Act against SBI or its affiliates for alleged violations of the Act, or for any other type of alleged misconduct, regardless of when such misconduct took place. The Commission's adjudication of any such complaint will be based solely on the record developed in that proceeding. Except as expressly provided in this Consent Decree, this Consent Decree shall not prevent the Commission from investigating new evidence of noncompliance by SBI with the Act, the Rules, or Commission orders.

10. **Voluntary Contribution.** SBI agrees to make a voluntary contribution to the United States Treasury, in the amount of fifty-two thousand dollars (\$52,000). The contribution will be made within thirty (30) calendar days after the Effective Date. The payment must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the Account Number and FRN referenced in the caption to the Adopting Order. Payment by check or money order may be mailed to the Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code). SBI will also send electronic notification of the payment to JoAnn.Lucanik@fcc.gov and Nissa.Laughner@fcc.gov on the date said payment is made.

11. **Waivers.** SBI waives any and all rights it may have to seek administrative or judicial reconsideration, review, appeal or stay, or to otherwise challenge or contest the validity of this Consent Decree and the Adopting Order, provided the Bureau issues an Adopting Order adopting the Consent Decree without change, addition, modification, or deletion. SBI shall retain the right to challenge Commission interpretation of the Consent Decree or any terms contained herein. If either Party (or the United States on behalf of the Commission) brings a judicial action to enforce the terms of the Adopting Order, neither SBI nor the Commission shall contest the validity of the Consent Decree or the Adopting Order, and SBI shall waive any statutory right to a trial *de novo*. SBI hereby agrees to waive any claims it may otherwise have under the Equal Access to Justice Act, 5 U.S.C. § 504 and 47 C.F.R. § 1.1501 *et seq.*, relating to the matters addressed in this Consent Decree.

12. **Invalidity.** In the event that this Consent Decree in its entirety is rendered invalid by any court of competent jurisdiction, it shall become null and void and may not be used in any manner in any legal proceeding.

13. **Subsequent Rule or Order.** The Parties agree that if any provision of the Consent Decree conflicts with any subsequent Rule or order adopted by the Commission (except an order specifically intended to revise the terms of this Consent Decree to which SBI does not expressly consent), that provision will be superseded by such Rule or order.

14. **Successors and Assigns.** SBI agrees that the provisions of this Consent Decree shall be binding on its successors, assigns, and transferees, and the Commission agrees that the provisions of this Consent Decree shall inure to the benefit of such successors, assigns and transferees.

15. **Final Settlement.** The Parties agree and acknowledge that this Consent Decree shall constitute a final settlement between the Parties. The Parties further agree that this Consent Decree does not constitute either an adjudication on the merits or a factual or legal finding or determination regarding any compliance or noncompliance with the requirements of the Act or the Commission's Rules and orders. The Parties agree that this Consent Decree is for settlement purposes only and that by agreeing to this Consent Decree, SBI does not admit noncompliance, violation or liability for violating the Act or the Rules in connection with the matters that are the subject of this Consent Decree.

16. **Modifications.** This Consent Decree cannot be modified without the advance written consent of both Parties.

17. **Paragraph Headings.** The headings of the Paragraphs in this Consent Decree are inserted for convenience only and are not intended to affect the meaning or interpretation of this Consent Decree.

18. **Authorized Representatives.** Each Party represents and warrants to the other that it has full power and authority to enter into this Consent Decree.

19. **Counterparts.** This Consent Decree may be signed in any number of counterparts (including by facsimile), each of which, when executed and delivered, shall be an original, and all of which counterparts together shall constitute one and the same fully executed instrument.

P. Michele Ellison
Chief, Enforcement Bureau

Date

Justin E. Hinkle
Chief Operating Officer
Smith Bagley, Inc.

Date